IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CENTRAL DIVISION

RONALD J. BLANCHET, Plaintiff, vs. FIRST AMERICAN BANK GROUP, LTD, Defendant.	No. C99-3070-MWB **ORDER AND MEMORANDUM OPINION REGARDING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

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Following the termination of his employment, plaintiff Ronald J. Blanchet brought this action against his former employer, defendant First American Bank Group, Ltd., alleging age and gender discrimination in violation of state and federal law, and a state common-law claim of retaliatory discharge, in violation of Iowa public policy, for refusing to participate in defendant's filing of an allegedly fraudulent insurance claim. First American Bank Group, Ltd. seeks summary judgment on all of Blanchet's claims.

I. INTRODUCTION

A. Procedural Background

Plaintiff Ronald J. Blanchet ("Blanchet") filed his complaint in this employment discrimination and retaliatory discharge lawsuit on September 16, 1999, following his termination from his position as Chief Financial Officer ("CFO") with defendant First American Bank Group, Ltd. ("FABG") on December 31, 1998. Blanchet alleges his dismissal was in violation of both federal and Iowa law, and his complaint avers four causes of action. Specifically, Cause of Action A contends FABG terminated Blanchet because of his age and, consequently, in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 623 *et seq.* Cause of Action B alleges sex discrimination in violation of Title VII, 42 U.S.C. § 2000e *et seq.*. Cause of Action C alleges Blanchet's

treatment and termination because of his age and sex constituted an unfair employment practice under the Iowa Civil Rights Act ("ICRA"), Iowa Code Ch. 216. And finally, Cause of Action D alleges Blanchet's termination was retaliatory and in violation of Iowa public policy because it resulted from Blanchet's refusal to participate in the filing of an allegedly fraudulent disability insurance claim on behalf of FABG's former president and Chief Executive Officer (CEO), William Gibb.

On January 24, 2001, FABG moved for summary judgment on each of Blanchet's claims.[1] FABG argues summary judgment is appropriate for several reasons, asserting primarily that Blanchet was terminated because he was not fulfilling his duties as CFO. More specifically, FABG contends Blanchet has failed to establish a *prima facie* case of age and sex discrimination because Blanchet cannot show that, at the time of his termination, he was performing his job at a level that met FABG's legitimate expectations. In addition, even if Blanchet could establish a *prima facie* case of discrimination, FABG argues Blanchet did not raise a question of fact as to whether FABG's stated legitimate justification for Blanchet's termination was pretextual and, consequently, did not create a reasonable inference that a protected characteristic was a determinative factor in his termination. Lastly, FABG argues that the Iowa public policy exception to the employment at will doctrine does not apply to the instant case because Blanchet's mere impression of a conversation, without more, does not rise to the level of a violation of public policy. And furthermore, because a discharge is not unlawful under this cause of action unless the public policy consideration is the determinative factor in a plaintiff's termination, FABG argues

[1]When addressing Blanchet's age and sex discrimination claims in its memorandum in support of its motion for summary judgment, FABG focused solely on the federal claims arising under the ADEA and Title VII, respectively. However, because the analyses are essentially identical under the ICRA, the court assumes that FABG also intended to move for summary judgment on Blanchet's Cause of Action C, which alleges a violation of the ICRA based on age and sex discrimination.

that its legitimate reasons for dismissinging Blanchet preclude a finding in his favor.

Blanchet opposed FABG's motion and filed a resistance on June 13, 2001.[2] Blanchet asserts he generated genuine issues of material fact on all of his claims, particularly on the issues of whether he was qualified to perform his job and whether FABG's articulated legitimate reasons were pretextual. FABG filed a reply on July 16, 2001.

In its original motion, defendant requested, and the court granted, oral arguments on this motion for summary judgment, which took place telephonically on August 28, 2001. Plaintiff Blanchet was represented at these arguments by Michael J. Carroll of Coppola, Sandre, McConville & Carroll P.C., West Des Moines, Iowa. Defendant FABG was represented by Neven J. Mulholland of Johnson, Erb, Bice, Kramer, Good & Mulholland, P.C., Fort Dodge, Iowa.

B. Factual Background

The court will discuss here only the nucleus of undisputed facts and such of the disputed facts as are necessary to provide a factual background for the legal analysis of the defendant's motion for summary judgment rather than attempt to provide an exhaustive dissertation of the undisputed and disputed facts of this case. In its legal analysis, the court will address in greater detail, where necessary, Blanchet's assertions of genuine issues of material fact that may preclude summary judgment in the defendant's favor.

Blanchet began his career with the defendant in 1981. At that time, he was employed by the defendant's predecessor, The State Bank in Fort Dodge, Iowa as an auditor and

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[2]Blanchet initially failed to file a timely response to FABG's motion for summary judgment. However, in the interests of justice, this court extended the deadline for plaintiff's response or resistance (Doc. No. 31) in lieu of disposing of the motion pursuant to N.D. IOWA LR 7.1(f), which provides that "[i]f no timely resistance to a motion is filed, the motion may be granted without prior notice from the court."

accountant. In 1982, a one bank holding company was formed, and the bank's name was changed to First American Bank, Fort Dodge (hereinafter Fort Dodge bank). During his tenure with the Fort Dodge bank, Blanchet received good performance evaluations and ultimately progressed to the position of comptroller. When the holding company acquired four new banks in 1994, the name of the company was changed to First American Bank Group, Ltd. ("FABG"). In October of 1994, Blanchet left his employment at the Fort Dodge bank to become Vice President and Chief Financial Officer ("CFO") of FABG. Blanchet was the company's first CFO, and he held this position until he was terminated on December 31, 1998.

In May or June of 1995, FABG's president and Chief Executive Officer, William Gibb, was diagnosed with cancer. Mr. Gibb was covered by several disability insurance policies. Despite the existence of those policies, however, Mr. Gibb continued to receive his full annual salary and retained the title of CEO after his diagnosis even though his ability to work was, at best, sporadic because of the severity of his illness and the side-effects of his treatments. Mr. Gibb passed away on December 21, 1996. Sometime prior to Gibb's death, he allegedly had a conversation with Thomas Schnurr ("Schnurr"), the current president and CEO of FABG, in which Gibb told Schnurr that he (Gibb) had asked Blanchet to process Gibb's disability claims in order to reimburse the company for the salary he had been drawing while ill. Schnurr told Tom Kregel ("Kregel"), Gibb's immediate successor as president and CEO, about this conversation with Gibb. After Gibb's death, Kregel approached Blanchet and asked him whether Gibb had requested that he process Gibb's disability claims. The parties agree that this conversation took place and that Blanchet denied having been instructed by Gibb to file any insurance claims. The parties part ways, however, in their impression of the intent behind this questioning: Blanchet claims Kregel approached him "with a wink and a nod" and that it was clear to Blanchet that Kregel was, in reality, asking Blanchet to falsify information in order to

explain FABG's delayed filing of Gibb's disability claims and, consequently, in order recover under those policies. FABG asserts that no unlawful intent undergirded Kregel's questioning of Blanchet. Instead, FABG argues Kregel was merely asking Blanchet, in reliance on credible information from Schnurr, whether Blanchet had indeed been instructed to file Gibb's claims.

Until 1997, Blanchet was the sole employee in FABG's accounting department. In April of 1997, Cindy Burke ("Burke") was promoted to assistant vice president of FABG from her previous position as vice president of commercial lending at the Fort Dodge bank. She reported to both Blanchet and another executive vice president, Lois Pannkuk ("Pannkuk"). While FABG contends it informed Blanchet in October of 1997 that he would eventually be dismissed, Blanchet claims he did not ultimately learn of his termination until October of 1998. He was discharge on December 31, 1998, and in January of 1999, Burke replaced him as the CFO of FABG. At this time, Burke was thirty years old, and Blanchet was forty-seven.

The nucleus of the disputed facts in this case centers on whether FABG ever informed Blanchet of his alleged shortcomings and whether there existed any nefarious intent behind questioning Blanchet about filing Gibb's insurance claims. While FABG points to a management study conducted by an independent organization, namely McGladley & Pullen, as objective evidence that Blanchet was a poor communicator and mediocre manager with an inability to look at the "big picture," Blanchet cites his most recent performance evaluation in 1997, which was satisfactory, as evidence that he was adequately performing his job. In October of 1997, Blanchet was given a raise of $1700 for 1998. At this same time, his subordinate, Burke, was given a raise of $10,000. Blanchet claims this evidences age and sex discrimination, especially in light of Blanchet's satisfactory performance review only two months later in December of 1997.

In 1998, prior to Blanchet's dismissal but after Burke was promoted to the holding

company, FABG initiated the Scout Talent Program. Whether this was intended to weed out older males, as Blanchet contends, or to identify potential employees for advancement within the company, as FABG contends, is unclear. However, the parties agree that this program was aimed at identifying non-officer employees, particularly women, for additional training. Blanchet argues that this program is evidence of a company-wide policy of replacing older male workers with younger females.

II. LEGAL ANALYSIS

A. Standards For Summary Judgment

This court has considered in some detail the standards applicable to motions for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure in a number of prior decisions. *See, e.g.*, *Swanson v. Van Otterloo,* 993 F. Supp. 1224, 1230-31 (N.D. Iowa 1998); *Dirks v. J.C. Robinson Seed Co.*, 980 F. Supp. 1303, 1305-07 (N.D. Iowa 1997); *Laird v. Stilwill*, 969 F. Supp. 1167, 1172-74 (N.D. Iowa 1997); *Rural Water Sys. No. 1 v. City of Sioux Center*, 967 F. Supp. 1483, 1499-1501 (N.D. Iowa 1997), *aff'd in pertinent part*, 202 F.3d 1035 (8th Cir. 2000), *cert. denied*, 531 U.S. 820, 121 S. Ct. 61 (2000); *Tralon Corp. v. Cedarapids, Inc.*, 966 F. Supp. 812, 817-18 (N.D. Iowa 1997), *aff'd*, 205 F.3d 1347 (8th Cir. 2000) (Table op.); *Security State Bank v. Firstar Bank Milwaukee, N.A.*, 965 F. Supp. 1237, 1239-40 (N.D. Iowa 1997); *Lockhart v. Cedar Rapids Community Sch. Dist.*, 963 F. Supp. 805 (N.D. Iowa 1997). The essentials of these standards are as follows.

1. Requirements of Rule 56

Rule 56 itself provides, in pertinent part, as follows:

> Rule 56. Summary Judgment
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> (b) For Defending Party. A party against whom a claim . . . is asserted . . . may, at any time, move for summary

> judgment in the party's favor as to all or any part thereof.
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> (c) Motions and Proceedings Thereon. . . . *The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.*

FED. R. CIV. P. 56(a)-(c) (emphasis added). Applying these standards, the trial judge's function at the summary judgment stage of the proceedings is not to weigh the evidence and determine the truth of the matter, but to determine whether there are genuine issues for trial. *Quick v. Donaldson Co.*, 90 F.3d 1372, 1376-77 (8th Cir. 1996); *Johnson v. Enron Corp.*, 906 F.2d 1234, 1237 (8th Cir. 1990). An issue of material fact is genuine if it has a real basis in the record. *Hartnagel v. Norman*, 953 F.2d 394 (8th Cir. 1992) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986)). As to whether a factual dispute is "material," the Supreme Court has explained, "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Rouse v. Benson*, 193 F.3d 936, 939 (8th Cir. 1999); *Beyerbach v. Sears*, 49 F.3d 1324, 1326 (8th Cir. 1995); *Hartnagel*, 953 F.2d at 394.

2. The parties' burdens

Procedurally, the moving party, here FABG, bears "the initial responsibility of informing the district court of the basis for its motion and identifying those portions of the record which show lack of a genuine issue." *Hartnagel*, 953 F.2d at 395 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)); *see also Rose-Maston*, 133 F.3d at 1107; *Reed v. Woodruff County, Ark.*, 7 F.3d 808, 810 (8th Cir. 1993). "When a moving party has carried its burden under *Rule* 56(c), its opponent must do more than simply show there is some metaphysical doubt as to the material facts." *Matsushita*, 475 U.S. at 586. Rather, the party opposing summary judgment, here Blanchet, is required under Rule 56(e) to go

beyond the pleadings, and by affidavits, or by the "depositions, answers to interrogatories, and admissions on file," designate "specific facts showing that there is a genuine issue for trial." FED. R. CIV. P. 56(e); *Celotex*, 477 U.S. at 324; *Rabushka ex. rel. United States v. Crane Co.*, 122 F.3d 559, 562 (8th Cir. 1997), *cert. denied*, 523 U.S. 1040 (1998); *McLaughlin v. Esselte Pendaflex Corp.*, 50 F.3d 507, 511 (8th Cir. 1995); *Beyerbach*, 49 F.3d at 1325. If a party fails to make a sufficient showing of an essential element of a claim with respect to which that party has the burden of proof, then the opposing party is "entitled to judgment as a matter of law." *Celotex Corp.*, 477 U.S. at 323; *In re Temporomandibular Joint (TMJ) Implants Prod. Liab. Litig.*, 113 F.3d 1484, 1492 (8th Cir. 1997). In reviewing the record, the court must view all the facts in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences that can be drawn from the facts. *See Matsushita Elec. Indus. Co.*, 475 U.S. at 587; *Quick*, 90 F.3d at 1377 (same).

3. Summary judgment in employment cases

Because this is an employment discrimination and retaliation case, it is well to remember that the Eighth Circuit Court of Appeals has cautioned that "summary judgment should seldom be used in employment-discrimination cases." *Crawford v. Runyon*, 37 F.3d 1338, 1341 (8th Cir. 1994) (citing *Johnson v. Minnesota Historical Soc'y*, 931 F.2d 1239, 1244 (8th Cir. 1991); *Hillebrand v. M-Tron Indus., Inc.*, 827 F.2d 363, 364 (8th Cir. 1987), *cert. denied*, 488 U.S. 1004 (1989)); *see also Snow v. Ridgeview Medical Ctr.*, 128 F.3d 1201, 1205 (8th Cir. 1997) (citing *Crawford*); *Helfter v. United Parcel Serv., Inc.*, 115 F.3d 613, 615 (8th Cir. 1997) (quoting *Crawford*); *Chock v. Northwest Airlines, Inc.*, 113 F.3d 861, 862 (8th Cir. 1997) ("We must also keep in mind, as our court has previously cautioned, that summary judgment should be used sparingly in employment discrimination cases," citing *Crawford*); *Smith v. St. Louis Univ.*, 109 F.3d 1261, 1264 (8th Cir. 1997) (quoting *Crawford*); *Hardin v. Hussmann Corp.*, 45 F.3d 262 (8th Cir. 1995) ("summary

judgments should only be used sparingly in employment discrimination cases," citing *Haglof v. Northwest Rehabilitation, Inc.*, 910 F.2d 492, 495 (8th Cir. 1990); *Hillebrand*, 827 F.2d at 364). Summary judgment is appropriate in employment discrimination cases only in "those rare instances where there is no dispute of fact and where there exists only one conclusion." *Johnson*, 931 F.2d at 1244; *see also Webb v. St. Louis Post-Dispatch*, 51 F.3d 147, 148 (8th Cir. 1995) (quoting *Johnson*, 931 F.2d at 1244); *Crawford*, 37 F.3d at 1341 (quoting *Johnson*, 931 F.2d at 1244). To put it another way, "[b]ecause discrimination cases often depend on inferences rather than on direct evidence, summary judgment should not be granted unless the evidence could not support any reasonable inference for the nonmovant." *Crawford*, 37 F.3d at 1341 (holding that there was a genuine issue of material fact precluding summary judgment); *accord Snow*, 128 F.3d at 1205 ("Because discrimination cases often turn on inferences rather than on direct evidence, we are particularly deferential to the nonmovant," citing *Crawford*); *Webb v. Garelick Mfg. Co.*, 94 F.3d 484, 486 (8th Cir. 1996) (citing *Crawford*, 37 F.3d at 1341); *Wooten v. Farmland Foods*, 58 F.3d 382, 385 (8th Cir. 1995) (quoting *Crawford*, 37 F.3d at 1341); *Johnson*, 931 F.2d at 1244.

However, not long ago, the Eighth Circuit Court of Appeals also observed that, "[a]lthough summary judgment should be used sparingly in the context of employment discrimination cases, *Crawford v. Runyon*, 37 F.3d 1338, 1341 (8th Cir. 1994), the plaintiff's evidence must go beyond the establishment of a prima facie case to support a reasonable inference regarding the alleged illicit reason for the defendant's action." *Landon v. Northwest Airlines, Inc.*, 72 F.3d 620, 624 (8th Cir. 1995) (citing *Reich v. Hoy Shoe Co.*, 32 F.3d 361, 365 (8th Cir. 1994)); *accord Kiel v. Select Artificials, Inc.*, 169 F.3d 1131, 1134 (8th Cir.) (observing that the burden-shifting framework of *McDonnell Douglas* must be used to determine whether summary judgment is appropriate), *cert. denied*, 528 U.S. 818 (1999). More recently, in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133

(2000), the Supreme Court reiterated that "'[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.'" *Reeves*, 530 U.S. at 142 (quoting *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981)).[3] Thus, what the plaintiff's evidence must show, to avoid summary judgment or judgment as a matter of law, is "'1, that the stated reasons were not the real reasons for [the plaintiff's] discharge; and 2, that age [or race, or sex, or other prohibited] discrimination was the real reason for [the plaintiff's] discharge.'" *Id.* at 153 (quoting the district court's jury instructions as properly stating the law). The Supreme Court clarified in *Reeves* that, to meet this burden, "a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, *may* permit the trier of fact to conclude that the employer unlawfully discriminated." *Id.* at 148 (emphasis added).

These special cautions seem to the court to be no less applicable here to Blanchet's state-law claims, because such claims also often depend upon inferences of the employer's motive, as is shown by application of the same burden-shifting analysis to retaliation claims as courts employ in discrimination cases. *See Moschetti v. Chicago, Central & Pacific R. Co.*, 119 F.3d 707, 709 (8th Cir. 1997) ("The order and allocation of the burden of proof in [a retaliation case under 42 U.S.C. § 2000e-3(a)] is laid out in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *accord Manning v. Metropolitan Life Ins. Co., Inc.*, 127 F.3d 686, 692 (8th Cir. 1997); *Jackson v. Delta Special Sch. Dist. No. 2*, 86 F.3d 1489, 1494 (8th Cir. 1996). Similarly, the Iowa Supreme Court has applied the burden-shifting

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[3] In *Reeves*, the Supreme Court was considering a motion for judgment as a matter of law *after* a jury trial, but the Supreme Court also reiterated that "the standard for granting summary judgment 'mirrors' the standard for judgment as a matter of law, such that 'the inquiry under each is the same.'" *Id.* at 150 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-51 (1986)). Therefore, the standards articulated in *Reeves* are applicable to the present motion for summary judgment.

analysis to common-law retaliation claims: The plaintiff must first establish a *prima facie* case of retaliatory discharge by showing protected activity, adverse employment action, and a causal connection between the two; the burden then shifts to the employer to state a legitimate reason for its action; finally, the plaintiff must demonstrate that the employer's reason is pretextual. *See, e.g.*, *City of Hampton v. Iowa Civil Rights Comm'n,* 554 N.W.2d 532, 536 (Iowa 1996); *Yockey v. State*, 540 N.W.2d 418, 422 (Iowa 1995); *Hulme v. Barrett*, 449 N.W.2d 629, 633 (Iowa 1989) (*Hulme I*).

With these standards in mind, the court turns to consideration of the specific grounds upon which FABG seeks summary judgment on each of Blanchet's claims of discriminatory or retaliatory discharge.

B. Age Discrimination Claim

Under the ADEA, it is "unlawful for an employer . . . to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a)(1). Because, in order to recover under the ADEA, a plaintiff must show the employer's decision was actually motivated by age, proof often depends on inferences, rather than on direct evidence. *See Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993). Likewise, because "[t]here will seldom be 'eyewitness' testimony as to the employer's mental processes," *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 716 (1983), the Eighth Circuit Court of Appeals employs the *McDonnell Douglas* framework to analyze ADEA claims that are based principally on circumstantial evidence. *See, e.g.*, *Hindman v. Transkrit Corp.*, 145 F.3d 986, 990-91 (8th Cir. 1998); *Madel v. FCI Marketing, Inc.*, 116 F.3d 1247, 1251 n. 2 (8th Cir. 1997) (citing *Bashara v. Black Hills Corp.*, 26 F.3d 820, 823 (8th Cir. 1994)); *see also Reeves*, 530 U.S. at 141 (assuming without deciding that "the *McDonnell Douglas* framework is fully applicable" to ADEA

claims).

Under the *McDonnell Douglas* burden-shifting framework, the plaintiff must first establish a *prima facie* case of age discrimination. *See, e.g.*, *Hindman*, 145 F.3d at 990.

> Generally, the plaintiff establishes this by producing evidence to show: (1) he or she is a member of a protected age group; (2) he or she was qualified for the position he [or she] held; (3) despite his or her qualifications, he or she was [terminated]; and (4) he or she was replaced by a younger person. *Ziegler*, 133 F.3d at 675 (citing *Hutson*, 63 F.3d at 776). . . .
>
> Once the plaintiff establishes a prima facie case of discrimination, the burden of production shifts to the employer to articulate a legitimate, non-discriminatory reason for the employment decision. *Hutson*, 63 F.3d at 776-77. If the employer provides a non-discriminatory reason, the presumption of discrimination disappears, and the plaintiff can only avoid summary judgment if he or she presents evidence that considered in its entirety, (1) creates a question of material fact as to whether the defendant's proffered reasons are pretextual and (2) creates a reasonable inference that age was a determinative factor in the adverse employment decision. *See Kneibert*, 129 F.3d at 452 (citing *Rothmeier*, 85 F.3d at 1336-37). At all times, the plaintiff retains the burden of persuading the fact finder that intentional discrimination was the motivation for the adverse employment action. *Rothmeier*, 85 F.3d at 1337.

Id. at 990-91 (footnotes omitted). A plaintiff's *prima facie* case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated. *Reeves*, 530 U.S. at 148. The court assumes—as does FABG—that Blanchet has established or generated a genuine issue of material fact on elements one, three, and four of his *prima facie* case. Specifically, Blanchet was forty-seven years old at the time of his discharge, he was terminated, and FABG subsequently hired Burke, who was thirty years old at the time in question, as CFO.

FABG contends Blanchet has failed to generate a genuine issue of material fact on

the second element of his *prima facie* case of age discrimination—namely, his qualification as CFO at FABG. FABG further argues that, in any event, even if Blanchet could establish a *prima facie* case, he has failed to raise a genuine issue of material fact regarding whether FABG's stated reason for his termination, his failure to properly perform his job duties, was pretextual. Additionally, FABG contends Blanchet has failed to generate a genuine issue of material fact as to whether his age was a motivating factor in FABG's decision to terminate him.

In support of its argument, FABG claims it gave Blanchet ample notice that his performance as CFO was sub-par and gave him abundant opportunity to improve upon his performance prior to his December 1998 termination. In fact, in a December 29, 1995 letter to Gibb and Kregel written by Blanchet, Blanchet admits that he "realize[s] that there are some functions that [he] [did not perform] as [FABG] would like [him] to do." Def. App. p. 19 (Doc. No. 19). The *Reeves* Court recognized that there are instances in which a plaintiff could "establish[] a prima facie case and set forth sufficient evidence to reject the defendant's explanation, [but in which] no rational factfinder could conclude that the action was discriminatory." *Reeves*, 530 U.S. at 148. The *Reeves* Court stated that summary judgment would be appropriate "if the record *conclusively revealed* some other, nondiscriminaotry reason for the employer's decision, or if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was *abundant and uncontroverted evidence* that no discrimination had occurred." *Id.* (emphasis added) Blanchet's admission that his performance could be improved upon does not make this case one of those instances hypothesized in *Reeves*. First, at the same time the letter admits imperfection, it also discusses Blanchet's accomplishments and implies that those accomplishments had been discussed between the parties. Further, the letter is dated approximately three years prior to Blanchet's termination. Thus, the court concludes that the letter does not constitute concrete proof that would function to preclude any rational

factfinder from finding for the plaintiff. *See Reeves*, 530 U.S. at 148. It is for the jury to decide what weight, if any, should be given to this letter. At this stage of the proceedings, the court's task is merely to determine whether there are any triable issues. *See Quick*, 90 F.3d at 1376-77.

FABG also contends that Kregel told Blanchet that he (Blanchet) would "not function as the CFO going forward" in October of 1997. Defendant Supp. App. p. 9 (Kregel Dep. pp. 41) (Doc. No. 40). Kregel claims FABG made this decision because the CFO position was, like the holding company, evolving, and it expanded beyond Blanchet's capabilities as a "numbers cruncher." FABG asserts that this evidence shows it was displeased with Blanchet's performance for an extended period of time and that Blanchet was aware of the company's dissatisfaction with his performance.

However, Blanchet denies having had this conversation with Kregel and reports that he did not learn of his termination until October 29, 1998. He claims that at the only point in time when he thought FABG might be dissatisfied, he was surprised by his satisfactory performance rating. Specifically, in October of 1997, Blanchet was given a raise of $1700; although significantly less than his prior raises from FABG, it was still a raise in salary. Two months later in December 1997, the results of his performance evaluation were satisfactory. Further, Blanchet claims that while he and Kregel were reviewing the evaluation, Kregel told Blanchet that his performance for the year was "fantastic." Plaintiff App. p. 18 (Ronald Blanchet Dep. p. 69, ll. 22-23) (Doc. No. 32). Kregel denies making this comment. Moreover, FABG attempts to explain the performance evaluation by making the dubious argument that it judged Blanchet's performance as CFO not on objective criteria, but rather on the basis of FABG's limited expectations of Blanchet in light of his finite capabilities.

FABG's principle support of its argument that Blanchet was indeed incompetent is its Chief Financial Officer Position Description. Defendant App. p. 16 (Doc. No. 19). In

particular, FABG points to the first duty listed, which is to plan, develop, and maintain organizational-wide accounting systems, policies, and goals. While Blanchet admits he did not complete this task, he contends that he had begun it. However, as the sole employee in the holding company's accounting department, Blanchet asserts that he was overwhelmed with work. Moreover, he disputes that FABG ever informed him that the uniformity project was a top priority, and, therefore, he did not prioritize it among his varied duties. The record on this point is by no means clear with respect to Blanchet's progress in establishing a uniform system of accounting for all the separate banks of the holding company. In Burke's deposition, she stated that while she could not comment on Blanchet's participation in the project, which was ultimately completed after Blanchet's termination, she confirmed that the project was underway in 1997 and 1998—in other words, while Blanchet was CFO of FABG. Plaintiff App. p. 55 (Burke Deposition, p. 14, l. 22, p. 15, l. 4) (Doc. No. 32). In addition, Kregel himself confirms that Blanchet had attempted to implement a uniform accounting system, but that "[h]e just never got the job done." Defendant Supp. App. p. 18 (Kregel Deposition, p. 85, l. 1) (Doc. No. 40). Because FABG relies so heavily on this project as one of its legitimate, nondiscriminatory reasons for Blanchet's termination, Blanchet's participation, success, and knowledge of its importance to FABG, if any, are genuine issues of material fact that could have a significant bearing on the outcome of this litigation and, consequently, are questions for a trier of fact, not the court.

The only other evidence FABG offers in support of its contention that Blanchet was an incompetent CFO is a report compiled by McGladrey & Pullen, L.L.P.'s Management Development Institute ("MDI")[4] in October of 1996. After a background interview,

[4]McGladrey & Pullen, L.L.P. provides, among other services, an assessment of its clients' management through its Management Development Institute ("MDI"). According to its website, the MDI "address[es] concerns about the competence, effectiveness and (continued…)

psychological testing, and work simulation exercises, the MDI identified four "potential derailers" in Blanchet's management abilities. Specifically, the MDI noted: (1) problems with interpersonal skills; (2) low leadership profile; (3) difficulty with "big-picture" thinking that does not involve numbers; and (4) inflexibility. At the same time, the report identified four "key strengths": (1) loyalty; (2) high task orientation; (3) superb analytical skills; and (4) skillful troubleshooting abilities. While it is clear that Blanchet's assessment results are not exceptional, they certainly do not unequivocally illustrate Blanchet's complete ineptitude as a CFO. The report itself states that its objective is to "build a personal portfolio of the central problems, issues and opportunities in [Blanchet's] career." Defendant App. p. 26 (Doc. No. 19). Thus, it is intended to identify *both* weaknesses and strengths so as to facilitate building upon strengths and improving upon weaknesses.

When viewed in the light most favorable to him as the non-moving party, as required by Rule 56, Blanchet's evidence sheds doubt on FABG's argument that by the end of Blanchet's tenure with FABG, it was clear to everyone that Blanchet was incompetent and was on his way out because of poor performance. Blanchet, therefore, has generated genuine issues of material fact concerning: (1) whether he was qualified for his position as CFO, thereby creating a question of fact on the only disputed element of his *prima facie* age discrimination case; and (2) whether his discharge was pretextual because FABG's satisfactory rating of Blanchet's performance does not comport with its claim that he was a failure as a CFO. The court agrees that, although the plaintiff's case is not the strongest case that this court has seen, Blanchet has generated genuine issues of material fact

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[4](…continued)
career potential of [its clients'] core management team." RSM McGladrey, Inc. Management Development Institute http://www.rsmmcgladrey.com/rsmmcgladrey_new.nsf/8f5aee734d115e9886256920006e9289/ec20fdaf5f05b548862569260058d8c7!OpenDocument (accessed Aug. 9, 2001) (hereinafter MDI Report).

sufficient to survive a motion for summary judgment. Under *Reeves*, a trier of fact may infer unlawful discrimination if it finds an employer's articulated reasons for dismissing an employee are pretextual. *Reeves*, 530 U.S. at 148. This permissive finding of unlawful motivation, coupled with the *Crawford* standard of caution in employment discrimination cases, counsels against the court's granting of summary judgment in favor of FABG under the facts presented in this case. *See Crawford*, 37 F.3d at 1341 ("Because discrimination cases often depend on inferences rather than on direct evidence, summary judgment should not be granted unless the evidence could not support any reasonable inference for the nonmovant."); *see also Snow*, 128 F.3d at 1205; *Webb v. Garelick Mfg. Co.*, 94 F.3d at 486; *Wooten*, 58 F.3d at 148; *Johnson*, 931 F.2d at 1244. This is not the kind of case hypothesized in *Reeves* in which "no rational factfinder could conclude that [FABG's] action was [age] discriminatory." *See Reeves*, 530 U.S. at 148. First, the record does not "conclusively revea[l] some other, nondiscriminatory reason for the employer's decision." *See id.* Nor has Blanchet "created only a weak issue of fact as to whether the employer's reason was untrue[,] and there [is not] abundant and uncontroverted independent evidence that no discrimination had occurred." *See id.* Instead, Blanchet has generated genuine issues of material fact right at the heart of the question of whether FABG's reason for his termination was discriminatory by pointing to evidence that he had been performing his job adequately and that FABG's assertions to the contrary are untrue. Were the court the trier of fact, it would have difficulty concluding from the evidence presented that Blanchet's discharge was indeed motivated by discriminatory animus. Even though Blanchet has presented sufficient evidence to present a jury question as to whether FABG's proffered legitimate reasons were in fact the real reasons, any inference that FABG was "dissembling to cover up a discriminatory purpose" is weak. *See id.* at 147. Yet, the trial judge's function at the summary judgment stage of the proceedings is not to weigh the evidence and determine the truth of the matter, but to determine whether there are genuine issues for

trial. *Quick*, 90 F.3d at 1376-77. As such, FABG's motion for summary judgment on Blanchet's age discrimination claim will be denied.

C. Sex Discrimination Claim

Blanchet asserts that FABG violated his state and federal rights by "discriminating against him because of his gender by terminating his employment." Pl.'s Cmplt., Causes of Action B and C, ¶¶ 27, 33. Specifically, he claims that his termination was in violation of Title VII and Chapter 216 of the Iowa Code. Both the state and federal sex discrimination claims are analyzed according to the *McDonnell Douglas* burden-shifting paradigm. *See O'Sullivan v. Minnesota*, 191 F.3d 965, 969 (8th Cir. 1999) ("These claims [of gender discrimination] are governed by the familiar analytical framework set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04, 93 S. Ct. 1817, 36 L. Ed. 2d 668, (1973)."); *Vivian v. Madison*, 601 N.W.2d 872, 873 (Iowa 1999) ("The ICRA was modeled after Title VII of the United States Civil Rights Act. Iowa courts therefore traditionally turn to federal law for guidance in evaluating the ICRA. *King v. Iowa Civil Rights Comm'n*, 334 N.W.2d 598, 601 (Iowa 1983)); *Board of Supervisors v. Iowa Civil Rights Comm'n*, 584 N.W.2d 252, 256 (Iowa 1998) ("In deciding gender discrimination disputes, we adhere to the Title VII analytical framework established in *McDonnell Douglas Corp. v. Green*) (citations omitted).

In *Breeding v. Arthur J. Gallagher & Co.*, 164 F.3d 1151, 1156 (8th Cir. 1999), the Eighth Circuit stated that a plaintiff's *prima facie* case of gender discrimination under Title VII consists of plaintiff showing the following: "(1) that [the plaintiff] is within the protected class; (2) that she [or he] was qualified to perform her [or his] job; (3) that she [or he] suffered an adverse employment action; and (4) that nonmembers of her [or his] class (persons . . . of the opposite gender in the Title VII sex discrimination context) were not treated the same." *Id.* "The fourth element in *Breeding*, however, necessarily implies

that the nonmembers of the plaintiff's class who 'were not treated the same' were 'similarly situated,' or the *prima facie* case would not serve its purpose." *Mercer v. City of Cedar Rapids*, 104 F. Supp. 2d 1130, 1158 (N.D. Iowa 2000).

In addition, a *prima facie* case of gender discrimination when the plaintiff is male involves one further step, which is referred to as a showing of "background circumstances."[5] *See Duffy v. Wolle*, 123 F.3d 1026, 1036 (8th Cir. 1997), *cert. denied*,

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[5]Other courts have criticized the background circumstances test as imposing a higher standard of proof on a particular class of plaintiffs. *See, e.g., Iadimarco v. Runyon*, 190 F.3d 151, 161 (3d Cir. 1999) (rejecting background circumstances test because it imposes a higher burden on a class of plaintiffs); *Lucas v. Dole*, 835 F.2d 532 (4th Cir. 1987) (describing background circumstances test as imposing higher burden for reverse discrimination plaintiffs and, therefore, rejecting the test); *Ulrich v. Exxon Corp.*, 824 F. Supp. 677, 683-84 (S.D. Tex. 1993) (describing background circumstances test as imposing a "heightened burden"); *Collins v. School Dist. of Kansas City*, 727 F. Supp. 1318, 1320 (W.D. Mo. 1990) (rejecting background circumstances test after concluding it imposes a higher *prima facie* burden).

Nonetheless, the following circuit courts of appeals have adopted the test: *Mills v. Health Care Serv. Corp.*, 171 F.3d 450, 457 (7th Cir. 1999); *Duffy*, 123 F.3d at 1036-37; *Reynolds v. School District No. 1*, 69 F.3d 1523, 1534 (10th Cir. 1995); *Notari v. Denver Water Dept.*, 971 F.2d 585 (10th Cir. 1995); *Parker v. Baltimore & O.R. Co.*, 652 F.2d 1012, 1017 (D.C. Cir. 1981); *Murray v. Thistledown Racing Club, Inc.*, 770 F.2d 63, 66-67 (6th Cir. 1985). United States district courts are routinely called upon to apply the test to reverse discrimination cases. *See, e.g., Ray v. Libbey Glass, Inc.*, 133 F. Supp. 2d 610, 620 (N.D. Ohio 2001) (describing showing of background circumstances sufficient to prove defendant is the unusual employer who discriminates against the majority as element of *prima facie* case of reverse discrimination); *DeWeese v. DaimlerChrysler Corp.*, 120 F. Supp. 2d 735, 747 (S.D. Ind. 2000) (same); *Olenick v. New York Telephone/A NYNEX Co.*, 881 F. Supp. 113, 114 (S.D.N.Y. 1995) (same); *Lemnitzer v. Philippine Airlines, Inc.*, 816 F. Supp. 1441, 1448 (N.D. Cal. 1992) (same), *aff'd in part, rev'd in part*, 52 F.3d 333 (9th Cir. 1995) (table op.).

Even courts that have adopted the test have subsequently called its continued validity into question. After adopting the test, the Sixth Circuit Court of Appeals later stated that it had "serious misgivings about the soundness of a test which imposes a more onerous (continued…)

523 U.S. 1137 (1998). The Eighth Circuit Court of Appeals recognized in *Duffy* that:

> In reverse discrimination cases, several courts have held that, to present a prima facie case, a plaintiff must show "that background circumstances support the suspicion that the defendant is that unusual employer who discriminates against the majority." *Murray v. Thistledown Racing Club, Inc.*, 770 F.2d 63, 67 (6th Cir.1985) (quotations and citations omitted); *see also Bishopp v. District of Columbia*, 788 F.2d 781, 786 (D.C.Cir.1986) ("A plaintiff's minority status by itself is sufficient in light of historical practice in the workplace toward such socially disfavored groups to give rise to an inference of discriminatory motivation. White males, who as a group historically have not been hindered in the workplace because of their race or sex, are required to offer other particularized evidence, apart from their race and sex, that suggests some reason why an employer might discriminate against them." (quotations, citations, and alterations omitted)).

Id. at 1036. The Court of Appeals for the District of Columbia noted that what constitutes a showing of background circumstances can be divided into two general categories:

> (1) evidence indicating that the particular employer at issue has some reason or inclination to discriminate invidiously against whites [or other forbidden characteristics], *see Daye v. Harris*, 655 F.2d 258, 261 (D.C. Cir. 1981) (minority nurses over-represented among promotees); *Bishopp v. District of Columbia*, 788 F.2d 781, 786-87 (D.C. Cir. 1986) (among other factors, minority supervisors and proposed affirmative action plan); *Lanphear v. Prokop*, 703 F.2d 1311, 1315 (D.C. Cir. 1983) (pressure on hiring authority to hire minorities and proposed affirmative action plan); and (2) evidence indicating

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[5](…continued)
standard for plaintiffs who are white or male than for their non-white or female counterparts." *Pierce v. Commonwealth Life Ins. Co.*, 40 F.3d 796, 801 n. 7 (6th Cir. 1994). The Sixth Circuit did not overrule its earlier adoption of the test, however, because the plaintiff in *Pierce* failed to meet his burden on other grounds. *See id.*

> that there is something "fishy" about the facts of the case at hand that raises an inference of discrimination. *See Daye*, 655 F.2d at 260-61 (plaintiff alleged "scheme" to fix performance ratings); *Lanphear*, 703 F.2d at 1315 (plaintiff was given "little or no consideration" for the promotion, and supervisor never fully reviewed qualifications of minority promotee); *Bishopp*, 788 F.2d at 786-87 (promotee was less qualified than four white plaintiffs and was promoted "over the[ir] heads … in an unprecedented fashion"). . . . "Background circumstances" need not mean "some circumstance in the employer's background." On the contrary, other evidence about the "background" of the case at hand—including an allegation of superior qualifications—can be equally valuable.

Harding v. Gray, 9 F.3d 150, 153 (D.C. Cir. 1993).

FABG asserts it is doubtful that Blanchet can generate a *prima facie* case of sex discrimination, especially under the arguably heightened standard of proof required under *Duffy*. The Second Circuit Court of Appeals, however, has characterized the evidence necessary to support a plaintiff's *prima facie* case in general as "minimal" and "de minimis." *Zimmermann v. Associates First Capital Corp.* 251 F.3d 376, 381 (2d Cir. 2001) (citing *Byrnie v. Town of Cromwell*, 243 F.3d 93, 101) (2d Cir. 2001); *Abdu-Brisson v. Delta Air Lines, Inc.*, 239 F.3d 456, 467 (2d Cir. 2001)). It further held that "the mere fact that a plaintiff was replaced by someone outside the protected class will suffice for the required inference of discrimination at the prima facie stage of the Title VII analysis." *Id.* (citing *Tarshis v. Riese Org.*, 211 F.3d 30, 36 (2d Cir. 2000); *Cook v. Arrowsmith Shelpburne, Inc.*, 69 F.3d 1235, 1239 (2d Cir. 1995)). The United States Supreme Court, too, acknowledged that "[t]he burden of establishing a prima facie case of disparate treatment is not onerous." *Texas Dept. of Cmmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981); *see also Hindman*, 145 F.3d at 991 (same).

Indeed in *Duffy*, the case in which the Eighth Circuit adopted the background circumstances test, the court held that the plaintiff had offered sufficient proof of

background circumstances to survive a motion for summary judgment. *See Duffy*, 123 F.3d at 1037. In *Duffy*, the male plaintiff filed a *Bivens* action to challenge the decision of a panel comprised of United States District Court Judges for the Southern District of Iowa to appoint a female applicant rather than the male plaintiff to the Chief United States Probation Officer position. The background circumstances which the circuit court held were sufficient to make a *prima facie* case of employment discrimination included allegations that the female applicant was substantially less qualified for the position than the plaintiff, that one member of the panel had mentioned an interest by someone in the Administrative Office in recruiting a woman, and that two members of the panel usually hired female law clerks. *Id.* Although not couched in terms of background circumstances, the evidence that Blanchet offers "[to] support the suspicion that [FABG] is that unusual employer who discriminates against the majority" is three-fold: First, he contends that FABG had an incentive to promote women in order to have greater gender balance with respect to the company's highest paid employees; second, he asserts that the Talent Scout program illustrates a general attitude within FABG of preferring women over men; and third, he intimates that his replacement, Burke, was less qualified to perform the position of CFO than he was. The court turns to a review of the facts alleged to support Blanchet's arguments.

Blanchet asserts Kregel told the plaintiff that Stark requested a list of the top paid employees at FABG. According to Blanchet, Kregel also stated that Stark was extremely upset by the fact that only one woman, Lois Pannkuk, was on the list. Plaintiff App. 9 (Blanchet Deposition p. 32, ll. 9-16) (Doc. No. 32). Blanchet argues that this, when coupled with Burke's ten-thousand dollar raise for 1998, evidences an intent by FABG to promote women into management in order to equalize upper-management salaries between men and women. The Talent Scout program is the second background circumstance Blanchet alleges. According to FABG's current President and CEO, Thomas Schnurr, the Talent Scout program was initiated in 1998 to "[i]dentify lower level employees

(particularly females) who could be considered for additional training and advancement and . . . to survey all employees as to their career plans, as to their strengths and abilities, to identify areas where they would like to improve their skills, and to identify candidates for promotion." Defendant App. 10 (Aff. of Thomas G. Schnurr, at p. 3) (Doc. No. 19). While FABG has not admitted in its depositions and affidavits that the program was designed solely, as opposed to "particularly," for women, Kregel admits that no men were considered for the program. Defendant Supp. App. 14 (Deposition Tom Kregel, p. 61, l. 20) (Doc. No. 40). However, he explained that this was because the program was designed for non-officers and that there were very few male non-officers. Defendant Supp. App. 14 (Deposition Tom Kregel, p. 61, l. 25) (Doc. No. 40). In addition, Blanchet contends that, in response to a question raised by Kregel at a meeting attended by Pannkuk, Kregel, Blanchet, and Burke, Pannkuk, the administrator of the Talent Scout program, stated: "Tom, you knew this program was only for women." Plaintiff App. 14 (Blanchet Deposition, p. 50, ll. 15-16). While Blanchet was not personally harmed by this program because Burke, his replacement, was (1) not a lower level employee targeted by the Scout Program, and (2) was already employed by FABG as Assistant Vice President before the program was initiated, the program demonstrates background circumstances sufficient to support Blanchet's *prima facie* case of discrimination.

The last background circumstance Blanchet alleges is that Burke was less qualified to serve as CFO. He asserts this fact raises an inference of discriminatory animus. The D.C. Circuit explained this inference, stating:

> A rational employer can be expected to promote the more qualified applicant over the less qualified, because it is in the employer's best interest to do so. And when an employer acts contrary to his apparent best interest in promoting a less-qualified minority applicant, it is more likely than not that the employer acted out of a discriminatory motive.

Harding, 9 F.3d at 153-54. In support of this argument, however, Blanchet offers little

more than bare assertions that, while working under Blanchet in 1997 and 1998, Burke's performance was mediocre. Both Burke and Blanchet are equally educated; both hold bachelor's of arts degrees, and both are Certified Public Accountants.

FABG disputes Blanchet's assertions that Burke was less qualified and further contends that Blanchet's *prima facie* case of gender discrimination fails on this point because he and Burke were not "similarly situated." According to FABG, Burke was substantially more qualified, pointing to Burke's positive MDI assessment, the fact FABG no longer contracts out accounting work to Schnurr & Co., and Burke's accomplishments as CFO, including successfully completing tasks and projects it argues Blanchet was unable to complete. Both parties also presented evidence that the essential functions of the CFO position have changed since Blanchet's termination, such as a greater number of employees in the accounting division and a single bank charter instead of individual charters among the several banks. While FABG asserts this is because Burke has greater "vision" and is better equipped to meet the demands of the position, Blanchet suggests the changes occurred in order to accommodate Burke's lesser capabilities. Nevertheless, while it is true bare assertions of superior qualifications create no genuine issues of fact and will not withstand summary judgment, in order to be "similarly situated," Blanchet and Burke need only be equally qualified. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). The court concludes that Blanchet has established or created a genuine issue of material fact on his *prima facie* case of gender discrimination, and, like his age discrimination claims, Blanchet's case, although weak, suffices to survive FABG's motion for summary judgment. *See Harding v. Gray*, 9 F.3d 150 (D.C. Cir. 1993) (finding plaintiff's allegation that he was better qualified than minority candidate chosen ahead of him for promotion could constitute sufficient background circumstances to establish a *prima facie* case of reverse discrimination). *But see Nelson v. City of Flint*, 136 F. Supp. 2d 703, 716 (E.D. Mich. 2001) (holding affirmative action plan insufficient to establish background circumstances).

Blanchet has created a genuine issue of material fact on the element of his qualifications, and his further assertions that he possesses superior qualifications, coupled with the stated purpose of the Talent Scout program, serve to generate a factual question regarding the existence of background circumstances necessary to support a claim of reverse sex discrimination.

FABG contends that, in light of the modest evidentiary standard that attends a *prima facie* showing, *see Burdine*, 450 U.S. at 253, 101 S.Ct. at 1094; *see also Hindman*, 145 F.3d at 991, if Blanchet can establish a *prima facie* case, FABG has articulated a legitimate, non-discriminatory reason for discharging him and that Blanchet has failed to come forward with any evidence to prove that defendant's proffered reason is pretextual or with any evidence that his termination actually resulted from discriminatory animus. Consequently, FABG asserts that Blanchet has not carried his burden under the *McDonnell Douglas* burden-shifting paradigm. As a male, Blanchet is protected under state and federal law (element one); there is a genuine issue of material fact as to whether Blanchet was qualified to perform his job as discussed earlier in this opinion (element two); he was terminated (element three); there is a genuine issue of material fact as to whether he and Burke were "similarly situated" (element four); and, as discussed above, he has set forth three background circumstances to support the suspicion that FABG is "that unusual employer who discriminates against the majority" (element five). *Duffy*, 123 F.3d at 1036 (citing *Murray*, 770 F.2d at 67; *Bishopp*, 788 F.2d at 786). As such, the burden shifts to FABG to articulate a legitimate, nondiscriminatory reason for Blanchet's termination, which it did by asserting Blanchet was incompetent and the company needed a CFO with more vision and greater leadership abilities. For the reasons set forth in Section II.B, the court reasserts that Blanchet has brought forth sufficient evidence, attenuated though it may be, to question the veracity of FABG's stated reasons, which may give rise to an inference of intentional discrimination. *See Reeves*, 530 U.S. at 148. In light of the *Crawford* standard of caution

in employment discrimination cases, the court again finds that Blanchet has generated genuine issues of material fact, the weight and truth of which can only be determined by a trier of fact. *See Crawford*, 37 F.3d at 1341.

D. Public Policy Claim

Next, the court turns to FABG's contention that it is entitled to summary judgment on Blanchet's remaining claim of wrongful discharge in violation of public policy, which, as explained above, is a claim that Blanchet was discharged for refusing to participate in an allegedly fraudulent insurance scheme. FABG contends that there is no evidence that the decision to end Blanchet's tenure with the company was in retaliation for his refusal to assist in filing disability claims on behalf of former CEO, Gibb. FABG further asserts that Blanchet was terminated because he was not fulfilling the role FABG envisioned of the CFO position and, in addition, that FABG merely asked Blanchet whether Gibb had asked him (Blanchet) to file a disability claim, acting on information that this request indeed had been made. FABG denies any fraudulent intent behind this question.

Blanchet argues otherwise and contends that he has established, or has generated a genuine issue of material fact as to, a causal connection between his refusal to state that Gibb had asked him to file a claim and his discharge by showing a chain of events linking the insurance conversation to his ultimate discharge, approximately one year and eight months later. Blanchet argues that the chain consists of several links. Namely, a couple of months after the initial conversation in April of 1997, Blanchet asserts that in a meeting attended by Blanchet, Kregel, and Schnurr in which the disability claims were discussed, Kregel told Blanchet that he was "too honest" and that his standards were "too high." Plaintiff App. 17 (Blanchet Dep. p. 65, ll. 3-7) (Doc. No. 32). And second, Blanchet contends that his $1700 raise, even though his performance evaluation was satisfactory, was an attempt by FABG to punish him for his lack of cooperation with the insurance claims.

Plaintiff App. 18 (Blanchet Dep. p. 66, ll. 8-17) (Doc. No. 32). Blanchet received this raise in October of 1997, six months after the conversation concerning the insurance claims. And finally, because the decision to terminate Blanchet was made, according to Kregel, two to three months prior to July of 1997, even though twenty months had passed between the conversation and Blanchet's termination, only one to three months had passed before FABG made the decision to discharge the plaintiff. Defendant Supp. App. 9 (Kregel Dep. p. 44, ll. 19-24).

As noted above, the Iowa Supreme Court has explained that a common-law claim of retaliation is also subject to a burden-shifting analysis: The plaintiff must establish a *prima facie* case of retaliatory discharge by showing "(1) engagement in a protected activity; (2) discharge; and (3) a causal connection between the conduct and the discharge." *Fitzgerald v. Salsbury Chem., Inc.*, 613 N.W.2d 275, 281 (Iowa 2000) (citing *Teachout v. Forest City Cmty. Sch. Dist.*, 584 N.W.2d 296, 299 (Iowa 1998)); *see, e.g., City of Hampton v. Iowa Civil Rights Comm'n*, 554 N.W.2d 532, 536 (Iowa 1996); *Yockey v. State*, 540 N.W.2d 418, 422 (Iowa 1995); *Hulme v. Barrett*, 449 N.W.2d 629, 633 (Iowa 1989) (*Hulme I*). The court agrees with Blanchet that there are genuine issues of material fact at each stage of this analysis.

Iowa law recognizes a common-law exception to the general rule of at-will employment when an employee's discharge is in clear violation of a well-established and well-defined public policy. *See, e.g., Fitzgerald*, 613 N.W.2d at 281 (outlining history of at-will employment doctrine and exceptions recognized in Iowa) (citing *French v. Foods, Inc.*, 495 N.W.2d 768, 769-71 (Iowa 1993) (employee handbook may create unilateral contract); *Springer v. Weeks & Leo Co.*, 429 N.W.2d 558, 560 (Iowa 1988) (narrow public policy exception adopted); *Abrisz v. Pulley Freight Lines, Inc.*, 270 N.W.2d 454,455 (Iowa 1978) (first recognizing the possibility of public policy exception)). FABG disagrees with Blanchet's assertion that he was engaged in protected activity. Instead, it contends that it

merely asked Blanchet whether he had been instructed to file a disability claim and that Iowa law does not recognize a public policy against questioning employees whether duties had been assigned to them and whether they had been performed. It cites *French v. Foods, Inc.*, 495 N.W.2d 768 (Iowa 1993), in support of this proposition, which the court finds puzzling because the public policy issues in the *French* case dealt with claims of being presumed innocent until proven guilty. While the case did involve the defendant's use of a private investigator's questioning of employees regarding violation of store policy, the Iowa Supreme Court held only that while the defendant's "tactics in obtaining [plaintiff's] written statement were high-handed and coercive, this case does not involve perjury or a criminal charge of dishonesty. Nor does it involve the presumption of innocence." *Id.* at 772. Nevertheless, FABG's assertion that questioning employees about duties is not in violation of Iowa public policy is presumably true, especially in light of the Iowa Supreme Court's recognition of "the employer's interest in operating its business in the manner it sees fit." *Fitzgerald*, 613 N.W.2d at 282 (citing 2 Henry H. Perritt, Jr., *Employee Dismissal Law and Practice* § 7.10 at 19 (4th ed. 1998)).

However, whether Kregel merely questioned Blanchet about a particular duty or intended Blanchet to read between the lines is at the heart of this lawsuit. Blanchet claims that, while the words Kregel used did not, on their face, request illegal or fraudulent conduct, Kregel approached Blanchet with a nod and a wink, and that Blanchet knew immediately that he had been requested to provide false information in order to recover under Gibb's insurance policies. "In determining whether a clear, well-recognized public policy exists for purposes of a cause of action, [Iowa courts] have primarily looked to statutes but have also indicated [the Iowa] Constitution to be an additional source." *Id.* at 283 (citing *Borschel v. City of Perry*, 512 N.W.2d 565, 567 (Iowa 1994)). Under the Iowa Insurance Fraud Act:

> A person commits a class "D" felony if the person, with the

> intent to defraud an insurer, does any of the following:
>
> *a*. Presents or causes to be presented to an insurer, any written document or oral statement, including a computer-generated document, as part of, or in support of, a claim for payment or other benefit pursuant to an insurance policy, knowing that such document or statement contains any false information concerning a material fact.
>
> *b*. Assists, abets, solicits, or conspires with another to present or cause to be presented to an insurer, any written document or oral statement, including a computer-generated document, that is intended to be presented to any insurer in connection with, or in support of, any claim for payment or other benefit pursuant to an insurance policy, knowing that such document or statement contains any false information concerning a material fact.
>
> *c*. Presents or causes to be presented to an insurer, any written document or oral statement, including a computer-generated document, as part of, or in, an application for insurance coverage, knowing that such document or statement contains false information concerning a material fact.

Iowa Code § 507E.3(2) (a-c). In order to explain the delay between Gibb's death and the filing of his disability claims, Blanchet asserts that Kregel asked him to sign an affidavit that stated Gibb asked Blanchet prior to Gibb's death to begin processing Gibb's claims. Because it is unlawful under Iowa law to file a fraudulent insurance claim or to assist in such a filing, if Blanchet indeed were asked to lie and, consequently, violate Iowa law, he would likely be protected by Iowa public policy. *See id.*; *see also Jones v. Lake Park Care* Ctr., 569 N.W.2d 369, 377 (Iowa 1997) ("Terminating an employee for refusal to do an illegal act is a violation of public policy."); *Smuck v. National Management Corp.*, 540 N.W.2d 669, 673 (Iowa Ct. App. 1995) ("We believe it is contrary to public policy to fire an employee for refusing to break any law, be it state or federal."). Furthermore, "[t]he public policy of this state . . . would be seriously impaired if it were to be held that one could be discharged by reason of his refusal to commit perjury." *Id.* at 286. Blanchet's

assertion that he was asked to sign an affidavit containing false information is sufficiently analogous to committing perjury that this court is of the opinion that a dismissal for any such refusal would be a violation of Iowa public policy.

The next element of Blanchet's *prima facie* case of retaliatory discharge is undisputed: He was terminated. However, a plaintiff who alleges retaliatory discharge in violation of public policy must not only have engaged in protected conduct and have been terminated; his discharge must jeopardize the public policy in question. *Fitzgerald*, 613 N.W.2d at 284 (citing *Yockey*, 540 N.W.2d at 421) (public policy favoring workers' compensation claim not frustrated if employer terminated employee for missing work due to the work-related injury). "The conduct of the employee must be tied to the public policy, so that the dismissal will undermine the public policy. . . ." *Id.* (citing *French*, 495 N.W.2d at 771-72) (public policy against suborning perjury not implicated if employer terminates the employee after using coercive and high-handed tactics to obtain confession). In other words, "this element requires the employee to show the conduct engaged in not only furthered the public policy, but dismissal would have a chilling effect on the public policy by discouraging the conduct." *See id.* (citing *Teachout*, 584 N.W.2d at 303, which held public policy to report suspected child abuse implicated when employee is terminated for good faith intent to report child abuse; and *Lara v. Thomas*, 512 N.W.2d 777, 782 (Iowa 1994), which held discharge for conduct that conforms to public policy would create a chilling effect on public policy by indirectly forcing employees to forego the conduct; and *Smith v. Smithway Motor Xpress, Inc.*, 464 N.W.2d 682, 684-85 (Iowa 1990), which held public policy for employees to file workers' compensation claim implicated when employee is terminated after receipt of workers' compensation benefits; and *Niblo v. Parr Mfg.*, 445 N.W.2d 351, 353 (Iowa 1989), which held public policy for employees to file workers' compensation claim is implicated when employee is terminated for threatening to file claim).

Blanchet's allegations on this point are analogous to the fact situation in *Fitzgerald*. In *Fitzgerald*, the plaintiff (Fitzgerald) was terminated after he expressed support for a former employee (Koresh) who had been terminated after testifying in a third former employee's wrongful death lawsuit. *Id.* at 287. Fitzgerald's employer warned him that Koresh's discharge might result in litigation and that Fitzgerald must decide which side he would support. *Id.* The employer in *Fitzgerald* argued that Fitzgerald's termination did not jeopardize public policy because the employer never requested that Fitzgerald commit perjury. *Id.* at 288. The employer asserted that absent an explicit request to violate public policy, Fitzgerald's discharge could not possibly undermine any public policy. *Id.* The court rejected this contention and held:

> [D]ismissal of an employee can jeopardize public policy when the employee has engaged in conduct consistent with the public policy without a request by the employer to violate public policy just as it can when the employee refuses to engage in conduct which is inconsistent with public policy when requested by the employer.

Id.

Here, too, FABG asserts that it did not request Blanchet to lie; Kregel merely asked Blanchet, according to FABG, a simple yes or no question. Yet, the Iowa Supreme Court clearly held that an explicit request to violate public policy is not necessary. *See id.* Thus, even if FABG did not expressly request Blanchet to participate in an insurance fraud scheme, if the trier of fact determines that was FABG's intent, it could also find that Blanchet's termination jeopardized public policy.

The third element of a plaintiff's *prima facie* case requires plaintiff show causation between the protected conduct alleged and the adverse employment action. "The causation standard in a common-law retaliatory discharge case is high." *Teachout*, 584 N.W.2d at 301 (citing *Hulme*, 480 N.W.2d at 42) (discussing statutory retaliatory discharge claim).

The Iowa Supreme Court has held that "engagement in the protected conduct must be the *determinative* factor in the employer's decision to take adverse action against the employee." *Id.* at 301-02 (citing *Smith v. Smithway Motor Xpress, Inc.*, 464 N.W.2d 682, 686 (Iowa 1990); *Graves v. O'Hara*, 576 N.W.2d 625, 628 (Iowa Ct. App. 1998)). "A factor is determinative if it is the reason that 'tips the scales decisively one way or the other,' even if it is not the predominant reason behind the employer's decision." *Id.* at 302 (citing *Smith*, 464 N.W.2d at 686).

In Blanchet's deposition, opposing counsel questioned Blanchet on this point. Namely, FABG's counsel asked Blanchet, "Now do I understand the allegations in your petition that you believe that you were terminated because of this conversation that you initially had with Tom Kregel in April of 1997 concerning the disability insurance coverage?" Def.'s App. p. 96 (Blanchet Dep. p. 66, ll. 4-7). Blanchet responded, "I believe that's the start of my demise at First American Bank Group." Def.'s App. p. 96 (Blanchet Dep. p. 66, ll. 8-9). FABG argues that this testimony constitutes an admission that Blanchet's refusal to sign an allegedly fraudulent document was not the determinative factor in his dismissal and, therefore, is an acknowledgment that he failed to establish a *prima facie* case. However, the Iowa Supreme Court cautioned that "the protected conduct must be the determining factor, but not the predominant factor." *Teachout*, 584 N.W.2d at 302 n. 2, *overruling Butts v. University of Osteopathic Med. & Health Sciences*, 561 N.W.2d 838, 842 (Iowa Ct. App.1997). Blanchet, for his part, denies that this testimony is inconsistent with the causation element of his *prima facie* case, because he contends that his discharge in violation of public policy claim consists of more than the single conversation between Blanchet and Kregel. Instead, he argues that the conversation was the first in a chain of events surrounding the Gibb insurance claim that lead to his dismissal. Furthermore, while FABG contends that the extraordinary time interval between the insurance conversation in April of 1997 and Blanchet's discharge in December of 1998 is

too great a delay as a matter of law to create an inference of causation, Blanchet asserts that these other events that occurred in the meantime functioned to prevent the inference from growing stale.

Evidence that an adverse employment action occurred after an employee engaged in protected conduct can be circumstantial evidence of an employer's retaliatory motive. *See Weinzetl v. Ruan Single Source Transp. Co.*, 587 N.W.2d 809, 811 (Iowa Ct. App. 1998) (recognizing harassment after employee filed workers' compensation claim was circumstantial evidence of retaliatory motive) (citing *Clarey v. K-Products Inc.*, 514 N.W.2d 900, 902 (Iowa 1994)). The Eighth Circuit Court of Appeals has held that the causal connection between allegedly retaliatory action by the employer and protected activity by the employee can be established by proof that the discharge followed the protected activity so closely in time as to justify an inference of retaliatory motive. *Carroll v. U.S. Dep't of Labor*, 78 F.3d 352, 356 (8th Cir. 1996) (stating this rule in a case involving retaliation under the Energy Reorganization Act (ERA)); *Kinkead v. Southwestern Bell Tel. Co.*, 49 F.3d 454, 456 (8th Cir. 1995) (stating this rule in an ERISA retaliation case); *Schweiss v. Chrysler Motors Corp.*, 987 F.2d 548, 549 (8th Cir. 1993) (stating this rule in a case in which a discharge followed a report to OSHA by only four days); *Rath v. Selection Research, Inc.*, 978 F.2d 1087, 1090 (8th Cir. 1992) (stating this rule, but expressing doubt that a discharge six months after alleged whistle-blowing met the causal connection requirement); *Couty v. Dole*, 886 F.2d 147, 148 (8th Cir. 1989) (a discharge thirty days after protected activity involved sufficient temporal proximity to establish the necessary causal connection); *Keys v. Lutheran Family & Children's Servs. of Mo.*, 668 F.2d 356, 358 (8th Cir. 1981) (a discharge less than two months after protected activity had sufficient proximity to establish the necessary causal connection).

Although the Iowa Supreme Court has stated that "[t]he mere fact that an adverse employment decision occurs after [protected activity] is not, standing alone, sufficient to

support a finding that the adverse employment decision was in retaliation to the discrimination claim," *Hulme v. Barrett*, 480 N.W.2d 40, 43 (Iowa 1992) (*Hulme II*), the inference arising from such temporal proximity may be sufficient to preclude summary judgment, particularly where temporal proximity is coupled with other evidence giving rise to an inference of illegal motive. *See Walters v. U.S. Gypsum Co.*, 537 N.W.2d 708, 712 (Iowa 1995) (holding that the trial court erred in granting summary judgment on a retaliatory discharge claim, because, although the issue would "no doubt be hotly disputed during a full trial," there was a genuine issue of material fact as to causal connection where the employee's termination followed on the heels of her discrimination complaint and she had never been disciplined for any of the reasons the employer gave for firing her).

The conversation between Kregel and Blanchet in which Blanchet claims Kregel implied that he wanted Blanchet to lie in order to recover under Gibb's disability policies occurred in April of 1997. Blanchet alleges that he learned of his dismissal sometime in October of 1998 and was ultimately terminated on December 31, 1998. In light of case law, this considerable delay is a significant hurdle for the plaintiff. As the cases cited above illustrate, eighteen months is an extraordinary and unprecedented amount of time on which to base an inference of causation. In *Fitzgerald*, for instance, the plaintiff was discharged only a few hours after the conversation with his supervisor in which the plaintiff was impliedly instructed to commit perjury and told to "start thinking like a foreman" and to "figure out which side he was on." *Fitzgerald*, 613 N.W.2d at 279. In *Phipps v. IASD Health Servs. Corp.*, 558 N.W.2d 198, 203 (Iowa 1997), the plaintiff was discharged one month after making an inquiry under the Iowa Wage Payment Collection Law, which he asserted was the reason behind his termination. The Iowa Supreme Court, however, held that because there was no evidence to support the plaintiff's retaliation claim other than the fact that the termination followed the filing of the grievance, summary judgment was appropriate. *Id.*

Furthermore, "the existence of other legal reasons or motives for the termination are relevant in considering causation." *Fitzgerald*, 613 N.W.2d at 288. An employer is not forbidden from discharging an employee for inadequate performance. *Cf. Hulme II*, 480 N.W.2d at 43 ("[T]he protection afforded by anti-retaliatory legislation [here, the Iowa Civil Rights Act] does not immunize the complainant from discharge for past or present inadequacies, unsatisfactory performance, or insubordination.") (citing *Jackson v. St. Joseph State Hosp.*, 840 F.2d 1387, 1391 (8th Cir.), *cert. denied*, 488 U.S. 892 (1988)). The court has discussed in detail FABG's stated reasons for dismissing Blanchet, and further recitation is unnecessary. It suffices to say that if FABG's articulated justification were accepted as true and legitimate, causation would more than likely be lacking. However, "[g]enerally, causation presents a question of fact. Thus, if there is a dispute over the conduct or the reasonable inferences to be drawn from the conduct, the jury must resolve the dispute." *Fitzgerald*, 613 N.W.2d at 289 (citing Perritt, *supra*, § 7.21, at 54). Because different inferences can be drawn from the evidence presented by Blanchet and FABG, summary judgment would be inappropriate in this case.

Based on the evidence produced, were the court the trier of fact, it would not find for the plaintiff. However, the court is not the trier of fact, and its role is "not to weigh the evidence . . . , decide credibility questions, or determine the truth of any factual issue; instead, [the court] perform[s] only a gatekeeper function of determining whether there is evidence in the summary judgment record generating a genuine issue of material fact for trial on each essential element of a claim." *Kampouris v. St. Louis Symphony*, 210 F.3d 845, 847 (8th Cir. 2000) (Bennett, J., dissenting) (citing *Bell v. Conopco, Inc.*, 186 F.3d 1099, 1101 (8th Cir.1999); *Do v. Wal-Mart Stores*, 162 F.3d 1010, 1012 (8th Cir.1998); *Peter v. Wedl*, 155 F.3d 992, 996 (8th Cir.1998); *Bryan v. Norfolk & Western Ry. Co.*, 154 F.3d 899, 902 (8th Cir.1998), *cert. dismissed*, 525 U.S. 1119 (1999); *Quick v. Donaldson Co.*, 90 F.3d 1372, 1376-77 (8th Cir.1996)). Moreover, "[t]he right of jury trial in civil

cases at common law is a basic and fundamental feature of our system of federal jurisprudence which is protected by the Seventh Amendment. A right so fundamental and sacred to the citizen, whether guaranteed by the Constitution or provided by statute, should be jealously guarded by the courts." *Jacob v. New York*, 315 U.S. 752, (1942); *see also Kampouris*, 210 F.3d at 849. While Blanchet's evidence is weak, he raises sufficiently genuine issues of material fact that should ultimately be determined by his peers. In light of the court's role in this stage of the proceedings and in light of the evidence produced, the court would be failing to "jealously guard" Blanchet's Seventh Amendment right to a trial were it to grant FABG's motion for summary judgment.

IV. CONCLUSION

The court concludes that genuine issues of material fact preclude summary judgment on Blanchet's age and sex discrimination claims. The court also finds that Blanchet has generated genuine issues of material fact on his retaliatory discharge in violation of Iowa public policy claim. Therefore, FABG's motion for summary judgment is **denied** in its entirety.

IT IS SO ORDERED.

DATED this 31st day of August, 2001.

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MARK W. BENNETT
CHIEF JUDGE, U. S. DISTRICT COURT
NORTHERN DISTRICT OF IOWA